

ATTACHMENT A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

G4S SECURE SOLUTIONS (USA), INC.

Employer

and

Case 12-RC-203988

INTERNATIONAL UNION, SECURITY, POLICE
AND FIRE PROFESSIONALS OF AMERICA,
LOCAL 610

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

International Union, Security, Police and Fire Professionals of America, Local 610 (the Petitioner), seeks to represent a unit of "all full-time (non-statutory) field supervisors (lieutenants) and shift supervisors (captains)" who are employed by G4S Secure Solutions (USA), Inc. (the Employer) at the Turkey Point Nuclear Power Plant in Florida City, Florida (the Turkey Point facility).¹ The Employer maintains that the unit sought by the Petitioner is inappropriate and that the petition should be dismissed because the lieutenants and captains are supervisors within the meaning of Section 2(11) of the Act. On August 17 and 18, 2017, a hearing officer of the Board held a hearing at the Region's Miami Resident Office. The parties filed post-hearing briefs on August 25, 2017.

¹ The parties stipulated, and I find, that the Employer, a corporation with an office and place of business located in Florida City, Florida, is engaged in providing contract guard and security services to business entities, including Florida Power & Light, the owner of the Turkey Point facility; during the past 12 months, the Employer purchased and received goods valued in excess of \$50,000.00 directly from points located outside the State of Florida; and the Employer is an employer within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act (the Act). The parties further stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

There are approximately 24 lieutenants and 4 captains in the unit sought by the Petitioner. The Employer also employs approximately 136 security officers at the Turkey Point facility, who are currently represented by the Petitioner in a separate bargaining unit. As explained below, I find that the Employer has established that the captains are supervisors within the meaning of Section 2(11) of the Act, and that there is insufficient evidence to establish that lieutenants are statutory supervisors. Accordingly, and I find that a unit comprised of the Employer's lieutenants at the Turkey Point facility is an appropriate unit. In view of the Petitioner's desire to proceed to an election in any unit found appropriate, I direct that an election be held to determine whether or not the lieutenants wish to be represented by the Petitioner.

I. Facts

Doing business as both G4S Secure Solutions (USA), Inc., and as its predecessor entity, The Wackenhut Corporation, the Employer has held a contract to perform security services to Florida Power & Light (FPL) at the Turkey Point facility for a number of years. Because the facility is a nuclear plant, it is heavily regulated by the Nuclear Regulatory Commission (NRC). The Employer and the NRC both publish lengthy policies to which all employees are required to adhere.

A. Prior Board cases involving the Employer's security operations for FPL at Turkey Point

In 2003, the Board certified the Petitioner as the collective bargaining representative of a unit of the Employer's Sergeants, a job title the Employer no longer uses, at the Turkey Point facility. See *Wackenhut Corp.*, 345 NLRB 850 (2005). In that case, the Board recounted the Employer's history of employment of security personnel at Turkey Point. Until September 1, 2003, the Employer employed four categories of employees at Turkey Point: captains, lieutenants, sergeants, and security officers. In July 1999, following a Board-conducted election, the Union was certified as the representative of the security officers, including CAS/SAS

operators,² unarmed security officers (also referred to as watchmen), and part-time security officers. 345 NLRB at 850.

In November 2002, the Union filed a representation petition seeking to represent the sergeants at Turkey Point. The Employer asserted that the sergeants were statutory supervisors. Following a hearing, the Regional Director issued a decision and direction of election, finding that the sergeants were not supervisors under the Act, and the Board subsequently denied the Employer's request for review of the decision and direction of election. Following an election, the Union was certified on March 4, 2003, as the representative of the Employer's sergeants at Turkey Point. 345 NLRB at 850.

Thereafter, in 2003, the Employer removed the CAS/SAS operator position from the bargaining unit, created supervisory CAS/SAS operator positions in the category of lieutenant, eliminated the sergeant position, and transferred the sergeant duties to lieutenants. The Board found that the Employer violated Section 8(a)(5) and (1) of the Act by these actions, and among other remedies, ordered the Employer to restore the CAS/SAS duties to the bargaining unit represented by the Union and restore the sergeant position as it existed before September 1, 2003. 345 NLRB at 852-855, 873. The Board rejected the Employer's contention that the CAS/SAS operating lieutenants were statutory supervisors because they directed employees and disciplined employees by issuing verbal and written counselings. 345 NLRB at 854-855.

In a subsequent unfair labor practice case, the Board determined that in February 2010, the Employer suspended and discharged two lieutenants whom it had employed at Turkey Point, in violation of Section 8(a)(1) of the Act, and that there was insufficient evidence to establish that those lieutenants were statutory supervisors, notwithstanding the Employer's contention that they possessed authority to discipline security officers and used independent judgment in

² CAS and SAS refer to the Central Alarm Station and Secondary Alarm Station at Turkey Point, respectively.

exercising that authority. *G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a The Wackenhut Corporation*, 362 NLRB No. 134, slip op. at 1-3 (2015), incorporating by reference 358 NLRB No. 160 (2012) and 359 NLRB No. 101 (2013), enfd. 670 Fed.Appx. 697 (11th Cir. 2016).

B. The Employer's operations at Turkey Point and evidence relevant to the asserted supervisory status of captains and lieutenants

The FPL Turkey Point facility covers several acres of land, including multiple buildings requiring varying levels of security. The entire premises is secured against the threat of intrusion and "radiological sabotage," which could cause a nuclear disaster in the heavily-populated Miami-Dade County area. The most closely guarded zone of the facility is known as the Protected Area.

Michael Mareth has been the Employer's Senior Director of Nuclear Operations since January 1, 2016. He was the Employer's Project Manager at Turkey Point from April 1, 2008 to December 31, 2015, and remained on site at Turkey Point until March 1, 2016, when James "Casey" Scott became the Project Manager at Turkey Point. Project Manager Scott has been the highest ranking Employer representative on-site since his promotion to that position on March 1, 2016. In that role, even when not at the Employer's premises, Scott is always on call for the purpose of handling significant events or problems. Several clerical employees, a Training Coordinator, a Weapons System Armorer/Lock and Key Coordinator, and Operations Coordinator (Manager) Juan Rodriguez report to Scott. The Project Manager and Operations Coordinator typically work weekday schedules.

Rodriguez oversees the four security teams or squads at Turkey Point, designated as the Alpha, Beta, Charlie, and Delta squads, or teams. There are two day shift squads and two night shift squads. Each squad works a twelve-hour shift, either from 5:40 a.m. to 6:00 p.m., or 5:40 p.m. to 6:00 a.m., for two to three consecutive days. The squads work in this fashion in

continual rotation. Each squad has one captain and six lieutenants. The Employer also refers to captains as security shift supervisors, and also refers to lieutenants as field supervisors.

Captains are responsible for the overall command and control of the on-duty security force on their shifts, and in a security emergency, would be the primary liaison between local law enforcement and the Employer's security force, and would communicate with the FPL operations department on site, who would take certain actions in order to ensure the safe shutdown of the plant. According to Project Manager Scott, the captain may also decide to relocate security forces in the event of a threat or attack, and would potentially make such decisions as to the Employer's entire work force on duty at the time.

Three of the four squads have a lieutenant who is designated as a "back-up" captain, who is qualified to fill in if that squad's captain is on vacation, or is otherwise unavailable and none of the other three captains are willing or able to fill in. Project Manager Scott testified that the frequency with which designated back-up captains actually fill in as captains varies, and that he could not provide any specific information in that regard. He further testified that the Employer had documents containing that information, but no such documents were entered in evidence.

Approximately 32 to 36 security officers (SOs) comprise the remainder of each squad. Lieutenants have between five and seven SOs each as their "direct reports." The four captains report to Operations Coordinator Rodriguez, lieutenants report to the captains of their respective squads, and SOs report to lieutenants.

The Central Alarm Station (CAS) and Secondary Alarm Station (SAS) are each staffed by one lieutenant on each shift. The alarm stations form the "central nervous system" of security operations. The lieutenants assigned as alarm station operators remain in the respective alarm stations for their entire 12 hour shift, monitoring intrusion detection systems, including perimeter alarms and camera systems. They assess any alarms, and dispatch SOs and/or local law

enforcement agencies to particular locations when and where there is a need for a response. The Employer also designates approximately three lieutenants per shift who work in separate geographic areas of the FPL Turkey Point facility, walking from post to post in "the field" and inspecting the SOs working at the posts in their respective areas. One of the lieutenants stationed in the field on a particular shift is designated as the response team leader for the shift. According to Project Manager Scott, all lieutenants are qualified to fill this role. The response team leader is responsible for the response team, a group of armed SOs on duty, some of whom are to respond to predetermined locations in the event of an attack or threat, and others who are to be deployed by the lieutenant in their area of the facility based on the nature of the incident.³

All security personnel, including captains and lieutenants, wear uniforms,⁴ communicate by radio, must be licensed to carry firearms, and must meet fitness for duty guidelines. SOs and lieutenants carry weapons with them on the job. Captains typically do not carry such "duty equipment." All SOs are qualified to fill all posts, and are rotated between posts so they gain more varied experience. Some SO posts are stationary at "BBREs," which are armored security booths. Other SO posts are active, walking routes indoors or outdoors.

Each security squad completes at least one annual full-scale drill of a "security contingency" event, with certain employees playing the part of intruders while others practice defending. At least annually, the NRC observes a full-scale drill to ensure the readiness of the security team to respond in the event of a terrorist attack. Other small-scale drills occur with the use of a tabletop model of the facility. In these drills SOs and lieutenants move game pieces representing themselves around the model while the circumstances of the drill are announced.

³ There is no evidence of an actual attack or threat requiring deployment of the response team, but the Employer has conducted drills requiring deployment of a response team. In Project Manager Scott's experience as a lieutenant, as a response team leader he has led two to three armed SOs in drilled responses.

⁴ Captains and lieutenants wear blue uniform shirts, whereas SOs wear green uniform shirts. Captains, lieutenants and SOs all wear tan uniform pants.

1. Hiring

It appears that the Employer prefers to hire and train SOs in "classes" or groups. Project Manager Scott is directly involved in the hiring process. He testified that in 2017, there came a time when applicants were selected for interviews.⁵ Two interview panels were formed to share the work. One panel consisting of Scott, an administrative assistant, and one lieutenant, interviewed between 10 and 15 applicants. The panel discussed the merits of each applicant. According to Scott, he was persuaded to follow the recommendation of the lieutenant not to hire one of the applicants. In response to a leading question, Scott asserted that he would have hired the applicant but for the lieutenant's recommendation. The other interview panel consisted of Operations Coordinator Rodriguez and the Training Coordinator, Blair Emerson. The record does not reflect how many applicants were interviewed by Rodriguez and Emerson, or how many applicants were hired.

This most recent round of interviews appears to have been only time in recent years when a lieutenant participated in job interviews for open SO positions. Scott testified that he planned to include lieutenants on interview panels in the future (but not the same lieutenant who recently participated as described above), "as a developmental opportunity for them and to get a broad perspective about the individuals that we're hiring." There is nothing in the record showing that captains are involved in the hiring process.

2. Promotions

Director Mareth testified that when he was the Project Manager of the facility, he was involved in the "promotion policy program," which "involves multiple personnel that are on a panel." Mareth testified that similar to the interview panels, there are two or three members of the promotion panel, including the Project Manager, someone in the Training Department, and

⁵ The record does not show who performed the initial round or rounds of screening that led to this selection.

one of the captains. Mareth's testimony concerning promotions was based on the period between 2009 and 2015. Lieutenants have not been included on promotion panels for elevating lieutenants to captain, or elevating security officers to lieutenant.

Promotion panels review the candidates' attendance and disciplinary records. Additionally, candidates are required to take a written examination and must score above a certain threshold in order to be considered for promotion. After the initial review of these documents, the promotion panel calls the qualifying candidates for their "oral board." A captain testified that when she participated in a lieutenant to captain promotion panel in 2007, 10 years ago, Rodriguez provided her with questions to ask and a scoring chart to evaluate the quality of the candidates' answers on a scale of 0 to 10. The evidence shows that although the interview scores are considered in determining promotions, the employee with the highest interview score is not always the one chosen to be promoted. The same captain testified that when she participated on a promotion panel, one candidate had about 50 points more than the rest on the oral board, but was not selected because of concerns of others on the panel that the candidate was not sufficiently trustworthy.

3. Assignment of work and transfers

Project Manager Scott testified that it is the responsibility of captains to adhere to NRC regulations dictating minimum manning requirements. The record is silent on how particular SOs come to be assigned to a particular squad. The captains create shift schedules for the SOs in their respective squads. The method of creating the schedule and making post assignments appears to vary among the captains, and includes considerations of seniority or experience. One captain testified that she creates the schedule using a matrix, pursuant to which SOs are assigned to posts on a rotation, so that individual SOs move to different posts daily.

Once a SO is assigned to a squad, captains, but not lieutenants, may approve the transfer of a SO between two squads and, therefore, to another shift schedule. Such transfers are typically temporary, and appear to occur when two SOs on different shifts voluntarily agree to trade shifts, and request approval from a captain.

When SOs are absent from work, they typically call the shift captain. They may also call the lieutenant on duty at the Central Alarm Station, who will then notify the captain. The captain is responsible for using a list of all squad members to call in volunteers to work overtime as needed. If more personnel are needed than there are available volunteers, the captain is responsible for calling SOs to report to work and cover the open posts on a mandatory basis. Captains also approve vacation requests.

Captains may also move SOs from one post location to another, such as from outdoors to indoors, taking into account environmental factors to determine whether the SO can still meet the security requirements of the new post. Such a move does not appear to impact the rotation or schedule. A captain testified that during the middle of a shift, a lieutenant may also approve a swap between two posts if the SOs seek one, or if there is some contingency like a medical accommodation that the schedule did not account for.

There is a general purpose log maintained at each post that contains a written statement of the responsibilities and instructions as to the SO duties specific to that post. Lieutenants perform post inspections to make sure SOs are at their assigned posts and are "fit for duty," meaning that they have proper credentials, uniform and equipment, are attentive, and know their responsibilities. Lieutenants also perform attentiveness checks with SOs via radio or telephone to make sure that they are awake and alert, and may require SOs to report their particular post responsibilities to ensure the SOs know why they are at their particular posts. At shift change "turnovers" the lieutenants also make sure the SOs have current credentials and equipment, and

that this is reflected on a "place keeper" they complete that is to be maintained at the post. If the incoming SO is not prepared in some way, the SO on the prior shift is required to report this by radio and remain on duty until the relieving SO is prepared. If, during mid-shift, a lieutenant performing a post inspection finds that a SO is inattentive or otherwise not fit for duty, the lieutenant relieves the SO until the deficiency is rectified (if necessary for the rest of the shift) or calls a spare SO who is on duty to man the post. The record is not clear about the extent to which extra officers are scheduled or available. The post must be covered. Lieutenants may relieve SOs from their posts for various reasons; for example, so the SO may get equipment, use a restroom, or get coffee.

4. Discipline, suspension and discharge

The Employer has progressive discipline policies for both attendance and work performance issues. The G4S Progressive Discipline Policy and Procedure has four steps: documented oral warning, written warning, written warning and suspension, and discharge. The following table and notes describing discipline levels and disciplinary actions are excerpted from the progressive discipline policy:

Categories of Discipline Guidelines

Category	First Offense	Second Offense	Third Offense	Fourth Offense
Level I	*Discharge			
Level II	Written Counseling and: (Optional) 1. Reduction in Job or Supervisory Designation 2. Suspension from Work 3. Other Appropriate Action(s)	Written Counseling and Suspension	*Discharge	
Level III	Oral Counseling (Undocumented or Documented)	Written Counseling	Written Counseling and Suspension (Optional) 1. Reduction in Job or Supervisory Designation 2. Suspension from Work 3. Other Appropriate Action(s)	*Discharge

*Upon review by the Directory, Nuclear Operations/DA and the Vice President, Nuclear Operations/DA, a decision will be made regarding suspension or administrative leave. The employee will be suspended without pay or placed on administrative leave with pay. An investigation will be conducted promptly by the Project Manager/DA before a final determination is made relative to discharge. The Project Manager/DA will notify Regulated Security Solutions concerning any ongoing investigation or suspension. All terminations need the approval of a Vice President/DA and associated reviewers.

NOTE: The second and third offenses refer to reoccurrence of the same type or similar infraction. If the second or third offense refers to a different category level, additional or more severe disciplinary action other than indicated in the table may be administered by the Project Manager/DA.

The same policy provides for the issuance of non-disciplinary coaching for the purpose of commending employees for good performance or offering suggestions to employees to improve performance or attain career goals. Among the performance infractions listed as Level III offenses are absenteeism and habitual lateness in reporting to duty or relieving another officer on post. The policy specifies that coaching is not required before the issuance of discipline.

The Employer's attendance policy, revised April 20, 2015, defines each type of attendance infraction (i.e. tardy, unexcused absence, no call / no show, and sick leave abuse) and specifies the penalties for each infraction of the same type within a rolling 12 month period.⁶

The attendance policy specifies that tardiness is to be reported on an Absentee Form, and that the

⁶ The most common attendance infractions, based on the disciplines in evidence, are tardiness and unexcused absence. Pursuant to the Employer's attendance policy the first tardiness infraction within a rolling twelve month period results in oral counseling, the second infraction results in written disciplinary counseling, the third infraction results in suspension and written disciplinary counseling, and the fourth infraction results in termination of employment; the first infraction for unexcused absences during a rolling twelve month period results in written counseling, the second infraction results in suspension and written disciplinary counseling, and the third infraction results in termination of employment.

Project Manager is to evaluate reasons for tardiness and consider mitigating circumstances before any discipline is administered. Unlike the progressive discipline policy for performance issues, as noted above generally the attendance policy does not distinguish between levels of discipline for attendance infractions, except that it states that the first incident of abuse of sick leave / unexcused absence during a twelve month rolling calendar shall be classified as a Level II infraction pursuant to the aforementioned progressive discipline policy regarding performance issues, and that a sick leave abuse infraction involving dishonesty or falsification shall be a Level I infraction.

Senior Director of Nuclear Operations Mareth testified that in January 2016, the Employer determined that lieutenants did not appear to be actively involved in the recommendation and issuance of the discipline, and that the captains were performing those functions. To address this issue, on January 29, 2016, Operations Coordinator Rodriguez sent the following email to the then-captains and the lieutenants designated as back-up captains:

Captains,

You need to reinforce the need for Supervisors to be actively involved in the determination process and issuance of documented coaching's [sic] and as applicable discipline action.

Simply stated the Lieutenants are supposed to be the ones putting together coaching's [sic] and as applicable discipline for their direct reports to include the issuance part.

The Captain is the one that handles suspensions and above.

Senior Director of Nuclear Operations Mareth further testified that in January and February 2016, he and Rodriguez met with the Employer's captains, as a group and individually, and told the captains that they:

... needed to ensure that the lieutenants were actively involved in the disciplinary policy, exercising their own judgment and coming to the shift captains with recommendations as far as what they believed should be the appropriate discipline issued, whether it was attendance or misconduct, because that was the part that we

felt that we weren't hitting the mark on after we first communicated this previously.

Project Manager Scott later sent an email to the Employer's lieutenants regarding "Lieutenant Responsibilities" on July 1, 2016, and at the same time forwarded a June 13, 2016, email from Senior Director of Nuclear Operations Mareth. Scott's email states, in relevant part:

All,

Please review the below email from Mike [Mareth] pertaining to the responsibilities of first line supervisors. This is part of the reason why we have been continually reinforcing the expectation that LTs [Lieutenants] issue discipline their own direct reports. [...]

The other big reason we want LTs to take an active role in the disciplinary process is from a leadership and individual development perspective. We do not assign direct reports to supervisors just to be able to check the box and say that we have a process for personnel development. I do actually expect that supervisors will be involved and continually provide coaching and positive reinforcement to their direct reports. Keep in mind that some of your officers have a strong potential and desire to advance within our organization, so you should be doing everything in your power to prepare them to take on more responsibility in the future. Even for those officers who do not desire to advance, you still have a responsibility to provide them with the feedback necessary to excel in their current roles.

Mareth's email forwarded by Scott states in relevant part:

The intent of this email is to reinforce one of the roles of our first line Supervisors, (Sergeant/Lieutenant) issuance of discipline.

...

Within our quasi-military structure, it is critical that our first line supervisory personnel – sergeants or lieutenants – be considered supervisors under federal labor law. We believe it is imperative that the sergeants, lieutenants (or similar positions) remain non-union and clearly part of the management and oversight structure, distinct from the officers they oversee. Because of the importance of this issue, we must take every possible action to ensure that sergeants or lieutenants are "supervisors" under federal law. Under the law in question, an individual is a ["supervisor" if he or she has the authority to do any one of the following: **hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline, or the ability to make an "effective recommendation" to a superior to take any of the listed actions.** Our first line Supervisors have limited or no functional role in several of the definition items listed in the previous sentence.

Within our highly regulated structure, in addition to having a role in the process of evaluating the officers which could have an impact on promotions, the key supervisory function we have to focus on is the independent judgment and or authority to issue disciplinary actions for lower level acts of misconduct. Supervisors have to understand their obligation to exercise their authority to issue discipline consistently and fairly, issuing discipline to all officers who engage in a particular type of misconduct regardless of personal like or dislike for a specific officer, and issuing comparable discipline to different officers for the same or similar acts of misconduct and their obligation to exercise their disciplinary authority **without** consulting with a direct report superior before doing so.

Organizationally we do not help maintain that separation if we shelter or exclude our first line Supervisors from being actively involved in the disciplinary process, specifically the independent judgment or authority piece.

Therefore the process of discipline determination and issuance should follow the following process:

- The Sergeant/Lieutenant reviews the event facts.
- The Sergeant/Lieutenant following the G4S discipline procedure/policy demonstrates independent judgment or authority and determines appropriate discipline for the event.
- The Sergeant/Lieutenant completes the appropriate discipline record.
- The Sergeant/Lieutenant provides the recommended discipline to their direct report Supervisor for a quality record review.
- The Sergeant/Lieutenant schedules meeting to review/issue discipline record to appropriate employee to include union rep. (as applicable).
- The Sergeant/Lieutenant conducts face to face review/issuance of discipline record following established practices.

[...]

(The bolded emphasis is in the original.)

Senior Director of Nuclear Operations Mareth testified that lieutenants do not have authority to issue or decide on suspensions, but may recommend them. As noted above, Mareth's email that was forwarded to lieutenants by Project Manager Scott states that supervisors (i.e. lieutenants) "have to understand their obligation to exercise their disciplinary authority **without** consulting with a direct report superior before doing so."

However, Mareth testified that in explaining this to captains, he told the captains that they:

.... needed to ensure that the lieutenants were actively involved in the disciplinary policy, exercising their own judgment and coming to the shift

captains with recommendations as far as what they believed should be the appropriate discipline issued, whether it was attendance or misconduct, because that was the part that we felt that we weren't hitting the mark on after we first communicated this previously.

Thus, it appears from Mareth's testimony that lieutenants are required to obtain approval from captains before issuing discipline. Project Manager Scott testified somewhat differently than Mareth in this regard. According to Scott, lieutenants may administer oral and written warnings for lower-level misconduct and attendance issues, and that lieutenants independently investigate incidents that may warrant discipline and may independently issue warnings without seeking permission from anybody else or having to make a recommendation to anybody higher in the chain of command.

According to Scott, the intent of his July 1, 2016, email, which forwarded Mareth's June 13, 2016, email, was to make sure that lieutenants personally investigate the circumstances of attendance and misconduct issues and review the SO's work history, then decide the level of discipline (or, presumably, that a coaching or no action is warranted), and finally take the action independently with respect to warning notices, without obtaining any superior's input. Scott further testified that lieutenants also investigate incidents that may lead to suspension or discharge and make recommendations to the shift captain, who has authority to suspend employees, and may recommend discharge to him as the Project Manager.

A captain testified that he has told lieutenants who report to him that they may issue non-disciplinary coachings or disciplines on their own, and that the lieutenants who report to him take such actions without reporting to him. However, he did not testify about any particular disciplines issued by lieutenants on his squad. That captain further testified that he had issued coachings and disciplines "generally" on his own when he was a lieutenant. He could only recall one particular discipline he had issued as a lieutenant, an oral warning to a SO sometime in 2016

because the SO ignored a sign. He testified that a lieutenant could consult with a captain about potential warnings or coachings, but was not required to do so.

In addition, the record shows that on July 20, 2017, the Employer issued a performance improvement plan (PIP) to a captain because the captain had personally issued a lot of lower level disciplines that, according to Scott, and as set forth in the PIP, should have been investigated and independently issued by his lieutenants.

The Employer introduced in evidence approximately 100 disciplinary notices signed by lieutenants since January 2016, a period of about 20 months. Of those disciplines, all but six were issued for alleged violations of the Employer's attendance policy. The remaining six disciplines were for work performance issues. Project Manager Scott acknowledged that none of the work performance disciplinary notices establish that the lieutenant who signed the disciplinary notice actually independently investigated the matter or issued it without seeking guidance from a captain or other superior manager (such as Operations Coordinator Rodriguez), and that he has no knowledge as to who investigated the incidents that led to the performance disciplines signed by lieutenants, or as to whether the lieutenants obtained guidance or approval from any superior officers or managers regarding the issuance of these disciplines. The same holds true for two non-disciplinary coachings issued by lieutenants that are in evidence. In addition, there is no indication that these documents were issued in the absence of any independent investigation by a captain or the project manager. It is also noted that the verbiage on these documents is typed, and many of the disciplines are worded similarly, without regard to which lieutenant signed them.

The six disciplines in evidence related to non-attendance performance issues that were signed by lieutenants include five oral warnings, and one written warning.⁷

Two of the oral warnings, both dated June 21, 2017, and signed on June 25, 2017, were issued to two SOs for the same alleged infraction, failing to sufficiently inspect a vehicle which had already been damaged, leading to the use of the vehicle even though it was damaged.⁸ Another of the non-attendance related oral warnings, dated February 19, 2016, and signed on February 20, 2016, was issued because the SO allegedly used profane language while speaking with a lieutenant in the presence of a fellow officer and "refused to complete a task within the scope of [his] position."⁹ The form states, "Per the Progressive Discipline Policy and Procedure WPO-1308, these are 2 separate Level III infractions." The oral warning was in line with the progressive discipline guidelines for two Level III infractions of differing natures.

Another oral warning, dated and signed on September 20, 2016, states that the SO was viewed using a cell phone while sitting at his post.¹⁰ The fifth non-attendance oral warning signed by a lieutenant, dated and signed on February 13, 2017, states that it was issued because while on post, the SO was "observed by a member of senior management being in a potentially inattentive position."¹¹ Thus, it appears that this discipline was likely initiated by the senior manager who observed the SO, rather than by the lieutenant who signed the warning notice.

⁷ A seventh non-attendance related discipline including in the Employer's compendium of disciplines signed by lieutenants, Employer Exhibit 14-64, was a one day suspension dated July 11, 2016, for failing to use a questioning attitude when being relieved, resulting in an improper post turnover, but that document is not signed by any asserted "supervisor," nor does it contain the name of any lieutenant or captain. In Employer Exhibit 15, the Employer acknowledged that the issuer of its Exhibit 14-64 is unknown.

⁸ Employer Exhibits 14-16 and 14-50.

⁹ Employer Exhibit 14-9.

¹⁰ Employer Exhibit 14-40.

¹¹ Employer Exhibit 14-23. This oral warning based on inattentiveness observed by a senior manager contrasts with a coaching issued to another SO on April 22, 2017, because the SO was seen by a plant worker watching a movie on an electronic device contrary to company policy. The "Employee Documented Coaching" coaching states that a future occurrence of the same nature "may" result in disciplinary action in accordance with the Employer's progressive discipline policy, but the form also states, "Coaching is not considered a form of disciplinary action." Employer Exhibit 18.

The only non-attendance based written warning in evidence that was issued to a SO and signed by a lieutenant, dated July 7, 2017, and signed on July 9, 2017, was based on a determination that the SO caused damage to a security vehicle, constituting "Failure to meet satisfactory job performance... in the opinion of management."¹² Although the warning notice was signed by a lieutenant, the evidence shows that a captain called Project Manager Scott about the vehicle damage that night. According to Scott, he and Operations Coordinator Rodriguez went to the scene of the accident. A captain also investigated the matter by conducting a "human performance walk-down," a review of the accident with the SO, in order to identify the contributing factors that led to the accident, and the captain then reported his findings to Scott and Rodriguez. Scott, Rodriguez, and captains also researched past disciplinary records for similar issues and Scott and Rodriguez determined that the written warning was warranted, and that the officer should be removed from the vehicle patrol rotation until further notice. Operations Coordinator Rodriguez asked the investigating captain if he disagreed with that determination. The captain did not disagree. There is no evidence that the lieutenant who signed the warning in this matter had any involvement in the investigation or the determination of the level of discipline.

As noted above, all of the other discipline notices in evidence that were signed by lieutenants are attendance-related. The attendance disciplines appear to follow the attendance policy uniformly. It is also noted that the wording of many of the attendance disciplines signed by lieutenants, stating the reason(s) for disciplinary action, corrective steps required, and action to be taken if the issue is not corrected, are typed and read very similarly regardless of which lieutenant signed the form. There is also evidence that captains direct lieutenants to create and issue attendance disciplines. Thus, a performance improvement plan issued to a captain states

¹² Employer Exhibit 14-57.

that for issues that if a supervisor (lieutenant) does not directly observe (e.g. attendance related), the captain is to notify the supervisor of the event, and the supervisor is then to "independently create and issue the discipline without further prompting."

Project Manager Scott testified that lieutenants may excuse a tardy when someone is just "30 seconds late." However, no evidence was introduced concerning specific instances of lieutenants' handling of situations when SOs were just seconds late, or situations where lieutenants excused tardiness. It is undisputed that only Operations Coordinator Rodriguez and Project Manager Scott (i.e. "management") have the authority to "excuse" attendance violations for more than very minimal tardiness, and this is reflected on several of the attendance disciplinary notices in evidence.

Project Manager Scott testified that while he was a lieutenant and back-up captain at Turkey Point, there was an incident on February 2, 2013, four and one-half years before the hearing in this matter, when a SO ignored his instruction to report to a specific location and instead turned off her radio, proceeded to the captain's office, and requested to go home early. Scott testified that he decided the SO's conduct warranted discipline, that he reviewed the discipline policy, used his judgment to decide that the offense was a Level II offense for failure to meet satisfactory job performance, and then checked with his captain to see if she agreed that the SO's conduct was a Level II offense. The captain agreed and Scott then issued a written warning to the SO. Scott did not testify as to whether or not the captain independently investigated the accident.

Scott further testified about two incidents in August 2013, and about one incident in December 2015, when, as a lieutenant and back-up captain, he determined that a non-disciplinary coaching was appropriate for certain performance and safety infractions, based on his determinations that there was no need to discipline the SOs in those instances.

A captain testified that when he was a lieutenant, he did not have to consult with a captain prior to issuing discipline, and that now, as captain, he sees the discipline initiated by his lieutenants only after the lieutenants have issued them to the offending SOs. The captain did not cite any specific instances when this has occurred. He further testified that approximately six times per month, he receives notice of completed coachings by lieutenants. Only two documented coachings signed by lieutenants were introduced in evidence. A lieutenant testified that he has never issued any formal discipline since becoming a lieutenant in October 2016, and that he always "bubbles up" disciplinary issues to his captain, though he discusses situations of potential discipline with other lieutenants. This lieutenant has issued coachings, and testified that he waits to see whether Operations Manager Rodriguez or Project Manager Scott will excuse the conduct, to avoid making a decision on discipline prematurely. Thus, it appears from his testimony, that potential disciplinary situations are brought to the attention of the two managers and considered by them.

The Employer also introduced in evidence 24 disciplinary notices issued by captains to lieutenants between July 2015, and July 2017. Within this two year period, about half of the disciplines were for attendance infractions. The other half were for failure of the lieutenants to perform their job duties. There is evidence establishing that captains issued lieutenants different types of discipline for apparently similar rules infractions. Thus, on June 23, 2017, a captain suspended a lieutenant for failing to verify the status of a door in his area, which led to a "security loggable" event when that door was found to be unlocked on a later shift. However, on July 3, 2017, the same captain issued an oral warning to a different lieutenant for the same alleged infraction. Neither of those discipline forms includes an assessment of the discipline "level" made by the captain. The record also contains emails showing that Project Manager Scott agreed with a captain's recommendations regarding the acceptability of excuses for

tardiness of security officers on two occasions in July and August 2017, and of an excuse for late notification of a callout by a security officer in August 2017.

A captain testified that although she has never suspended an employee without consulting the Project Manager or the Operations Coordinator, she has the authority to take that action, and that in doing so she would follow the Employer's progressive discipline policies with respect to both attendance violations and performance violations, in order to determine the proper level of discipline. She further testified that the only time she suspended employees was approximately 10 years ago, when two lieutenants had a confrontation in the alarm station. On that occasion, she called the Project Manager and reported the incident, and pursuant to his instructions she sent both lieutenants home. The same captain acknowledged that she decides whether to discipline or "coach" her subordinates, both lieutenants and SOs, based on the severity of the incident that potentially warrants discipline. Senior Director of Nuclear Operations Mareth testified that in about 2014, when he was the Project Manager, the same captain investigated a vehicle accident in which a SO drove into a pole. The captain reported her findings about the accident to him and recommended that the SO be suspended with a written warning. The then-Project Manager testified that he agreed with the captain's recommendation, and the SO received the suspension and written warning during the same shift when the accident occurred. Although not entirely clear, it appears from the Senior Director's testimony that he relied on the captain's report and recommendation and that he did not personally investigate that incident.

5. Responsible direction of work

As noted above, there is evidence that a captain is currently on a performance improvement plan (PIP). The PIP identifies the deficiencies in his performance as: "1. Administrative tasks are not being performed timely/correctly. 2. Inadequate follow-up on tasks delegated to supervisors." The first area concerns the need for the captain to complete such

duties as approving vacation/PTO requests and updating the "personnel summary" accordingly within one week.

A captain testified that she once received a written reprimand because another captain and one of his lieutenants who were working on her squad had failed to properly authorize overtime of SOs pursuant to the collective-bargaining agreement between the Petitioner and the Employer regarding the unit of SOs already represented by the Petitioner.

A lieutenant testified that he is held accountable for something done by a SO on his team. Specifically, he recalled an incident in which two officers failed to search vehicles that were traveling back and forth through the protected area at Turkey Point. The lieutenant testified that he had briefed the two officers on their responsibilities, which apparently required them to search vehicles, but one vehicle was not searched, and was parked in the protected area, a violation of regulations. The lieutenant recalled that his performance concerning this incident was documented, though he did not recall whether it was in a disciplinary notice or a documented coaching, and he did not recall who issued the documentation. Another lieutenant testified that lieutenants "are given more accountability" (i.e. more than SOs) for the areas under their supervision. Although he could not recall being disciplined for something that someone on his team did or failed to do, he testified that he has gotten "a reminder... more of a talking to" from his captain about the failure of SOs on his team to turn in their quarterly observations on time.

An oral warning notice issued by a captain to a lieutenant serving as the Second Alarm System operator, on June 7, 2017, states:

On Tuesday, May 23, 2017, as the SAS operator, you were overseeing Gate 917 operations of a vehicle exiting the PA [Protected Area]. In the process of securing Gate 917, the Security Officer was having difficulty receiving a reset on the gate alarm. After the alarm reset and you communicated it via the radio to the security officer, the security officer left the gate without locking it with the padlock. Although your attention at the time was "getting a reset on the BMS

alarm," you failed to validate "if the gate was locked and secure" prior to the security officer leaving the area. You should have been more involved "Active Leadership" in preventing this event from occurring.

It appears that this warning was based on the second alarm station lieutenant's own conduct in failing to determine whether the SO locked the gate, rather than simply on the SO's failure to lock the gate.

6. Secondary indicia

In addition to secondary indicia of supervisory status discussed above, such as the ratio of alleged supervisors to subordinates and uniform shirts, both lieutenants and captains are paid more than SOs – about \$5 per hour and \$9 per hour more than the highest paid SOs, respectively, and they are eligible for higher bonuses than SOs. Lieutenants and captains are required to report for duty about ten minutes earlier per shift than their direct reports, and attend regular meetings of supervisors.

It appears to be undisputed that all security personnel at the Turkey Point facility understand that lieutenants are "supervisors" and that captains are "shift supervisors", insofar as this terminology refers to the chain of command in the Employer's quasi-military structure. It is further undisputed that lieutenants are "above" the SOs, their direct reports, and that lieutenants can answer questions about how to do the job and comply with the myriad regulations governing their duties.

II. Analysis

A. Legal Principles

Section 2(11) of the Act states:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In cases involving an assertion of supervisory exclusion from the Act's rights and protections, the party asserting the exclusion bears the burden of proving that the person at issue possesses the authority to exercise at least one of the indicia set forth in Section 2(11) of the Act or to effectively recommend any of these actions. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). As stated by the Board in *Veolia Transportation Services*, 363 NLRB No. 98, slip op. at 7 (2016):

Purely conclusory evidence does not satisfy that burden. *Lynwood Manor*, 350 NLRB 489, 490 (2007). Lack of evidence is construed against the party asserting supervisory status. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). Supervisory status is not proven where the record evidence "is in conflict or otherwise inconclusive." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Detailed, specific evidence is required to meet the burden to establishing supervisory status. *Veolia Transportation Services*, 363 NLRB No. 188, slip op. at 7 fn. 19 (2016), citing *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015).

The authority to effectively recommend generally means that "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997).

"Independent judgment" occurs when the individual exercising the authority acts or effectively recommends the action free of the control of others, having formed an opinion about which action – among multiple possibilities – to take by discerning and comparing data. *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015), incorporating by reference, 358 NLRB 1701 (2012), citing *Oakwood Healthcare*, 348 NLRB at 692-693. A purported judgment "is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Oakwood Healthcare*, 348 NLRB at 693.

B. Captains are Supervisors Within the Meaning of Section 2(11) of the Act.

For the reasons detailed below, I conclude that the Employer has met its burden of establishing that captains exercise independent judgment in connection with the discipline, suspension, and transfer of employees, and therefore they are statutory supervisors who should be excluded from the proposed bargaining unit. The four captains are the highest ranked security officers employed by the Employer at the Turkey Point facility, and they are in charge of squads of up to approximately 40 lieutenants and security officers on duty at any given time. In addition, although the Project Manager is on call during the night shift, the captains who work on the night shift are the highest ranking persons on duty.

The independent judgment requirement in relation to the authority to discipline employees was explained by the Board in *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 7-11 (2016):

To confer supervisory status based on the authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. See *Sheraton Universal [Hotel]*, supra, 350 NLRB [1114] at 1116 [2007] ("Contrary to the judge's speculation, nothing in the record suggests that upper management conducted an independent investigation before deciding to impose discipline. . ."); *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 669 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003). Warnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisory authority. See *Willamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Loyalhanna Health Care Associates*, 332 NLRB 933, 934 (2000) (warning merely reportorial where it simply described incident, did not recommend disposition, and higher authority determined what, if any, discipline was warranted); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings that are merely reportorial and not linked to disciplinary action affecting job status are not evidence of supervisory authority). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. See *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

It is undisputed that the Employer's captains have the authority to independently suspend SOs and lieutenants, and to issue them warnings that lead to more serious discipline for future

similar infractions, including suspension and discharge. The record contains several disciplinary records that appear to show that captains have exercised discretion and independent judgment in issuing discipline to lieutenants for shortcomings in their job performance. Furthermore, I find that the record as a whole demonstrates that the captains determine the level of discipline that is warranted by the circumstances of the infraction, as demonstrated by the different treatment that a captain issued for two similar offenses that occurred within weeks of each other. In addition, captains provide guidance to lieutenants regarding lower level discipline and it appears that captains effectively approve the signing and issuance of disciplinary notices by lieutenants under their command to SOs.

Based on the above, and the record as a whole, I find that the Employer has met its burden of establishing that its captains are supervisors within the meaning of Section 2(11) of the Act because they have authority to discipline and suspend employees, or to effectively recommend those actions, and their exercise of that authority requires the use of independent judgment.

Assignment of an employee to a certain department, a certain shift, or to certain significant overall tasks generally qualifies as an assignment of work. However, choosing the order in which an employee will perform discrete tasks within those assignments is not indicative of exercising the authority to assign work. *Oakwood Healthcare*, 348 NLRB at 689.

The record does not reflect how lieutenants and SOs are initially assigned to a shift after being hired, or whether captains or others make the initial assignments. Captains are responsible for establishing the daily schedules for their shifts. However, this action appears to be governed largely, if not entirely, by NRA regulations, and, in the case of scheduling of SOs, the collective-bargaining agreement and/or seniority, but a captain acknowledged that some captains consider employee experience in filling post assignments. On the other hand, the SOs are all qualified to

work all posts to which SOs may be assigned, and are thus essentially fungible except for personal preference or temporary exigencies like illness or light duty. It appears that lieutenants are also qualified to work at all jobs to which they may be scheduled to perform on a given day, such as field supervisor, CAS operator, or SAS operator. Thus, there is insufficient evidence to show that the scheduling function alone demonstrates that captains exercise supervisory authority in connection with the assignment of work. However, captains also approve transfers of SOs between two squads and, therefore, to another shift schedule, at least on a temporary basis. I find that such transfers establish the assignment of work by captains.

With respect to the Employer's contention that captains responsibly direct employees, the Board has found:

[f]or direction to be "responsible" under the Act, "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691-692. To establish responsible direction, the Employer must show that the lieutenants are held accountable for the performance and work of the employees they direct. It is not enough to show that the lieutenants are accountable for their own mistakes. *Id.* at 695; see *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154-2155 (2011), *enfd.* in relevant part [810] F.3d [287] (5th Cir. [2015]) ("Every circuit court that has interpreted *Oakwood* has read it to require responsibility for others' actions." (citation omitted)).

G4S Government Solutions, Inc. d/b/a WSI Savannah River Site, 363 NLRB No. 113, slip op. at 1 (2016).

The Employer cites a performance improvement plan (PIP) issued to a captain, in part because lieutenants under the captain's supervision failed to perform their duty of issuing discipline to SOs. The PIP states that the captain failed to inform lieutenants under his supervision about SO attendance infractions and failed to direct the lieutenants to create and issue attendance disciplines regarding those infractions. Thus, it appears that the PIP was not issued to the captain simply because the lieutenants failed to issue attendance disciplines, but

rather based on the captain's own failure to tell the lieutenants about SO violations of attendance policy. The second instance of evidence in which a captain was arguably held accountable for the performance of other employees occurred when the Employer issued a written reprimand to a captain for permitting another captain and a lieutenant to work overtime in a way that contradicted the collective-bargaining agreement covering the security officers. However, this event occurred five years ago, the reprimand itself was not entered into evidence, and it is not clear whether the captain was reprimanded for her own performance, i.e. her failure to properly staff the shift, or based on the conduct of those who filled in for her. I find that there is insufficient evidence in the record to establish that captains responsibly direct work.

I find that the methodology for determining promotions is unchanged from prior decisions involving this facility. The role of captains in evaluating candidates' written materials and oral responses is only one of many components considered by the Employer when making decisions about promotions. The evidence also shows that captains' involvement is too remote from the final decision to constitute an effective recommendation of promotion.

There is no evidence or claim that captains possess any other indicia of supervisory status.

In summary, I find that captains are statutory supervisors based on their authority to suspend and discipline employees, and to assign work to employees in making transfers between squads.

C. There is Insufficient Evidence to Establish that Lieutenants are Supervisors within the Meaning of Section 2(11) of the Act.

The Employer asserts that lieutenants possess authority and exercise the requisite independent judgment in the assignment of work to SOs, the responsible direction of the SOs' work, and in choosing whether and what level of discipline to issue to SOs for policy infractions. The Employer also asserts that lieutenants make effective recommendations regarding hiring

decisions, and that the ability of lieutenants to serve as “back-up” captains imbues them with all of the supervisory power of a regular captain when on duty in that capacity. Finally, the Employer emphasizes that its “quasi-military” structure relies on the status of lieutenants as supervisors, and argues that a finding that they are not supervisors within the meaning of the Act will destroy their authority amongst the SOs, leading to potential chaos in the field and potential devastation for both the Turkey Point facility and the surrounding population in the event of a terrorist attack.

With respect to disciplinary authority, as stated in the messages issued to captains and lieutenants in 2016 by Senior Director of Nuclear Operations Mareth and Project Manager Scott, the Employer has consciously attempted to ensure that its lieutenants are considered statutory supervisors, even though it acknowledged that at that time, the Employer had not “hit the mark” with respect to ensuring that “lieutenants were actively involved in the disciplinary policy, exercising their own judgment and coming to the shift captains with recommendations as far as what they believed should be the appropriate discipline issued. .” As noted above, in prior cases, by 2016 the Board had concluded that there was insufficient evidence to establish that the employees ranking immediately above security officers in its chain of command at Turkey Point were statutory supervisors. *G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a The Wackenhut Corporation*, 362 NLRB No. 134, slip op. at 1-3 (2015), incorporating by reference 358 NLRB No. 160 (2012) and 359 NLRB No. 101 (2013), *enfd.* 670 Fed.Appx. 697 (11th Cir. 2016); *Wackenhut Corp.*, 345 NLRB 850 (2005).

Mareth directed that the focus should be on establishing that lieutenants use “independent judgment and or authority to issue disciplinary actions for lower level acts of misconduct.” (Emphasis supplied). At one point in his June 13, 2016, email, quoted at length above, Mareth states that lieutenants are to issue discipline without consulting with a direct report superior

before doing so. However, later in the same email, and again in his testimony, Mareth specified that lieutenants are required to provide recommendations for discipline of SOs to captains for a "quality record review" before issuing discipline to an SO.

The record shows that the vast majority of the disciplines signed by lieutenants since the Employer acknowledged the lack of involvement of lieutenants in the disciplinary process in 2016, are disciplines for attendance infractions. The record shows that the attendance disciplines issued by lieutenants have been determined based on a mechanistic application of the Employer's attendance policy. Moreover, it appears from the PIP in evidence that captains are responsible for informing lieutenants about attendance infractions in the first instance, thereby initially prompting the lieutenants to create attendance disciplines. In addition, the evidence shows that captains provide guidance to lieutenants to make sure that they are issuing the correct level of warning.

As noted above, of the six disciplinary forms in the record for non-attendance infractions that were signed by lieutenants, five are oral warnings and one is a written warning. One of the oral warnings was apparently prompted by a member of senior management based on the wording in the warning. Testimony establishes that the written warning resulting from the vehicle accident was investigated and determined by the Project Manager and the Operations Coordinator, with the assistance of a captain, rather than by the lieutenant who signed the written warning. Additionally, Project Manager Scott, through whom all of the disciplinary records signed by lieutenants were introduced in evidence, admitted that none of the work performance disciplinary notices establish that the lieutenant who signed the disciplinary notice actually independently investigated the matter or issued it without seeking guidance from a captain or other superior manager (such as Operations Coordinator Rodriguez). Scott further admitted that he has no knowledge as to who investigated the incidents that led to the performance disciplines

signed by lieutenants, or as to whether the lieutenants obtained guidance or approval from any superior officers or managers regarding the issuance of these disciplines. Scott's testimony about the aforementioned written warning resulting from the vehicle accident was the only discipline signed by a lieutenant about which he provided any specific testimony. The anecdotal testimony regarding disciplines issued by Scott and a captain when they were lieutenants was not supported by any documentary evidence, and for the most part was not based on recent events, and I give it little weight.

Although lieutenants may choose to issue a coaching instead of a warning in certain instances, coachings are considered non-disciplinary, and the issuance of a coaching does not appear to result in discipline for subsequent infractions of the same nature. Despite the testimony that lieutenants may counsel or coach a SO for a first offense and issue a discipline to the same SO for a second such offense, only two documented coachings were entered in evidence, and there is no evidence of a warning notice being issued for an offense for which a SO had previously received a documented coaching from a lieutenant. In addition, the coaching form and Employer policy specify that a coaching is non-disciplinary, and do not contain any link between documented coaching and discipline. Accordingly, I find the authority of lieutenants to coach SOs is distinguishable from the facts in *Oak Park Nursing Care Center*, 351 NLRB 27, 28-30 (2007), relied on by the Employer, where the Board found that counseling forms laid the foundation for more severe discipline.

For the above reasons, I find that there is insufficient evidence to establish that lieutenants use independent judgment in the determination of discipline, or that they effectively recommend the issuance of discipline. In this regard, I find that there is insufficient evidence to establish that the email messages of Senior Director of Nuclear Operations Mareth and Project Manager Scott conferred supervisory authority on lieutenants. Rather, it appears that although

the Employer sought to create the appearance that lieutenants are statutory supervisors exercising independent judgment, the lieutenants must still obtain review by captains, who apparently decide whether lieutenants may issue discipline, even as to attendance warnings that simply follow the Employer's specific attendance policy. In this regard, the email instructions of Mareth, which were forwarded by Scott to lieutenants, make it clear that the Employer's policies in this regard to lieutenants' role in the disciplinary process have not changed since the Board issued its decision in *G4S Regulated Security Solutions* in 2015, noting that lieutenants had been instructed to get a captain's review before issuing discipline. 362 NLRB No. 134, slip op. at 3, cited in *G4S Government Solutions, Inc. d/b/a WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3, fn. 9 (instruction to get a captain's review before issuing discipline supported a finding that the lieutenants did not have the authority to exercise independent judgment in issuing discipline).

With respect to the assignment of work, in another case involving lieutenants employed at a different nuclear power facility by an entity that is apparently related to the Employer herein, the Board held:

With respect to the lieutenants' purported authority to assign, we find that the Employer did not establish that the lieutenants possess this authority. First, there is no evidence that approving or adjusting post rotation schedules involves more than routine judgment. Second, in temporarily reassigning employees to areas where they are not normally assigned, there is no evidence concerning which factors lieutenants consider apart from whether the employees have the skill and knowledge to staff a particular post. Such assessments do not require the use of independent judgment sufficient to support a supervisory finding. *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004).

G4S Government Solutions, Inc. d/b/a WSI Savannah River Site, 363 NLRB No. 113, slip op. at 2. At Turkey Point, the lieutenants' role in assigning daily work to SOs is significantly more limited than the captains' role in making daily work assignments. As noted above, rotation assignments are made by the captains based primarily on the collective-bargaining agreement,

and captains ensure that all the posts are filled. Each post contains written information that describes in detail the roles and responsibilities specific to the post. The SOs cannot deviate from the duties described in the general purpose log and the lieutenants cannot authorize a change to those duties at a given post. Moreover, all SOs are qualified to work at all posts. Although lieutenants may decide to approve a swap of posts for SOs within a shift, there is insufficient evidence to establish that they exercise independent judgment in deciding whether to approve the swap. Instead, the lieutenants' decision making in approving mid-shift swaps appears to be routine or clerical in nature, and appear to be based on SO preferences. Such swap requests are generally approved unless there is some reason, like a medically compelled light duty assignment, which prevents the swap.

The Employer contends that lieutenants exercise supervisory authority with respect to the assignment of work in the occasional force-on-force trainings, during which lieutenants direct specific movements of SOs in response to mock attacks on the Turkey Point nuclear power facility. However, the direction of such discrete tasks in the context of training exercises held only occasionally does not constitute the exercise of supervisory authority with respect to the assignment of work. The assignment must instead affect an employee's shift, place of work or department, and overall duties. SOs' overall duties are dictated by their job description and the general purpose log that exists for their particular assigned post. In summary, there is insufficient evidence to establish that lieutenants exercise independent judgment with respect to the assignment of work.

I also find that there is insufficient evidence to show that lieutenants responsibly direct work. In this regard, the Board concluded that there was insufficient evidence that lieutenants at another nuclear power plant, in which the facts are very similar to those in the instant case, responsibly direct the work of security officers:

... the Employer has not established that lieutenants use independent judgment in directing employees in tactical and non-tactical situations. For non-tactical direction, such as conducting daily muster, determining if employees are fit for duty, performing post checks, and responding to routine incidents, the record establishes that the Employer has detailed security orders, post orders, standard procedures, and other directives and regulations that govern non-tactical direction. Similarly, for tactical direction, various witnesses testified that each area and post had very detailed response plans and standard procedures governing responses to real or simulated incidents and emergencies. Although there was testimony about some variables a lieutenant might consider in giving direction, it is vague and lacks even general examples of choices lieutenants make in tactical situations.

Id.

Although an oral warning was issued to a lieutenant when an SO did not padlock a gate, it is apparent that the warning was issued because of the lieutenant's own failure to notice the missing padlock, rather than because of the SO's failure to install the padlock. The vague testimony that a lieutenant was spoken to about the failure of his SO reports to submit observations, and that another lieutenant was either coached or disciplined (the witness could not recall which) because of the failure of a SO to perform work, without more, is insufficient to establish that the Employer holds lieutenants responsible for the work of SOs to whom they provide direction.

Like a captain's role on a promotion panel, a lieutenant's role on the Employer's hiring boards, which has only occurred on a single instance by a single lieutenant to date, is merely advisory, and is insufficient to establish that lieutenants have authority to hire or effectively recommend the hire of employees. The process for hiring includes many components, only one of which is the applicant's interview with the panel members. Although Project Manager Scott testified that the lieutenant's input led to the rejection of an applicant Scott might otherwise have hired, this was in response to a leading question and I give this testimony little weight. Moreover, there is insufficient evidence to show that the lieutenant made an effective recommendation as to any applicant who the Employer decided to hire.

For the foregoing reasons and based on the record as a whole, I find that there is insufficient evidence to establish that lieutenants are supervisors within the meaning of Section 2(11) of the Act.

The record does not establish how frequently the three lieutenants who are back-up captains serve in a captain's role. Accordingly, the lieutenants who are back-up captains may vote subject to challenge.

III. Conclusion and Findings

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time field supervisors (lieutenants) employed by the Employer at the Turkey Point Nuclear Power Plant in Florida City, Florida; excluding all office clerical employees, security officers, shift supervisors (captains), professional employees, and supervisors as defined in the Act.

IV. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by International Union, Security, Police and Fire Professionals of America, Local 610.

A. Election Details

The election will be held on November 1, 2017, from 4:45 a.m. to 6:45 a.m. and from 4:45 p.m. to 6:45 p.m. and on November 2, 2017, from 4:45 a.m. to 6:45 a.m. and from 4:45 p.m. to 6:45 p.m., at the Nuclear Entrance Building, First Floor Security Storage Room, at the Turkey Point Nuclear Power Plant, 9730 S.W. 344 Street, Florida City, Florida.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending October 13, 2017, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

C. Employer to Submit List of Eligible Voters

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters within two (2) business days after the date of issuance of this Decision and Direction of Election.

To be timely filed and served, the list must be *received* by the regional director and the parties by **October 19, 2017**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-ruleseffective-April-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

V. Right to Request Review

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days

after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review. Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: October 17, 2017.



David Cohen, Acting Regional Director
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